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KK LIM & ASSOCIATES v. OCBC BANK (MALAYSIA) BHD

HIGH COURT MALAYA, KUALA LUMPUR
SU TIANG JOO J
[CIVIL SUIT NO: WA-22NCvC-63-01-2022]
26 AUGUST 2024

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Abstract – *In the administration of justice, justice should not only be done but manifestly and undoubtedly be seen to be done. Pursuant to rr. 3 and 28 of the Legal Profession (Practice and Etiquette) Rules 1978, an advocate and solicitor is not to appear in any case in which he would be embarrassed or has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if, while appearing in a case, it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interest. A strict test ought to be observed in ensuring that not only is there no actual conflict but there is no appearance of conflict on the part of those involved in the administration of justice including counsel representing the parties to the action.*

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LEGAL PROFESSION: *Privilege – Communication between solicitor and client – Application to disqualify firm and counsel from representation – Whether firm and counsel material witness in suit – Whether information that may have been acquired protected by professional legal privilege – Whether evidence sought to be admitted privileged or came within exceptions to professional legal privilege bar – Whether lawyer's invoice for fees and disbursements privileged from disclosure – Whether bank statements covered by solicitor-client privilege – Whether case for disqualification made out – Whether application premature – Legal Profession (Practice and Etiquette) Rules 1978, rr. 3 & 28*

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The defendant bank commenced an action in the High Court ('fraud suit') through M/s Shook Lin & Bok naming the plaintiff law firm ('plaintiff') as the 13th defendant alongside 36 other defendants. In the fraud suit, the defendant bank alleged that the plaintiff, which prepared loan and security documents for credit facilities, was privy to a fraud perpetrated upon the bank whereby the securities charged to the bank were overvalued, causing the bank to suffer losses when it came time to enforce the charges made in its favour. The plaintiff applied to have itself struck out as party to the fraud suit. It failed at the High Court but succeeded at the Court of Appeal. The plaintiff then commenced this action against the defendant bank alleging, *inter alia*, that: (i) the defendant bank should not have suspended the plaintiff from its panelship; (ii) the defendant bank's personnel, employees, officers, agents and or representatives had wrongfully disseminated

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information regarding the plaintiff's suspension of panelship to third parties including other financial institutions which affected its business and reputation; (iii) following the filing of the fraud suit, the plaintiff suffered loss of business and consequently, it was dissolved with all its ten branches shut down; (iv) the fraud suit constituted a tort of abuse of process filed in bad faith and for collateral purposes seeking reliefs which the defendant bank had already obtained in its recovery action against the borrowers and enforcement of charge actions; (v) it had, at all material times, discharged its obligations as the transactional solicitors for all the loans; and (vi) it was forced to unnecessarily defend itself against the fraud suit for almost six years until it was finally struck out causing it to incur unnecessary legal costs, its reputation tarnished and having to shut down. The defendant bank filed a defence and counterclaim alleging, *inter alia*, that: (i) it was entitled to do what it did; (ii) the plaintiff had negligently advised the defendant bank to disburse the loan sums and had conspired with the rest of the defendants in the fraud suit to defraud it; and (iii) counterclaimed against the plaintiff for committing the tort of abuse of process against it in commencing committal proceedings against it. The action herein was predicated upon the fraud suit against the plaintiff having been struck out by the Court of Appeal. However, the defendant bank had successfully applied for leave to appeal against the Court of Appeal decision and during the hearing of its substantive appeal, the Federal Court had allowed its appeal. The net result was that the plaintiff was reinstated as a party to the fraud suit. In this application, the plaintiff sought to remove and/or disqualify and/or restrain the law firm M/s Shook Lin & Bok from acting for the defendant in this action on the premise that M/s Shook Lin & Bok and its counsel, Tan Gian Chung, would be material witnesses.

Held (dismissing plaintiff's application with no order as to costs):

(1) In view of the reinstatement of the plaintiff as a party to the fraud suit, the fraud suit by the defendant bank could no longer be said to be an abuse of process. (para 9)

(2) The information, that may have been acquired by M/s Shook Lin & Bok and its lawyers, including Tan Gian Chung, whom the plaintiff contended would be material witnesses pursuant to rr. 3 and 28 of the Legal Profession (Practice and Etiquette) Rules 1978, was protected by professional legal privilege. The plaintiff had not identified the materials and, if necessary, for the court itself to peruse the materials to ascertain whether any of the evidence sought to be admitted was in fact and in law privileged or came within the exceptions to the professional legal privilege bar before determining that it was indeed so privileged. To wait until the trial to commence and then to carry out a trial within a trial ('TWT'), to determine whether the asserted legally privileged

information was admissible, would disrupt the smooth flow of trial. If the TWT favoured the plaintiff, there might then be a need for the defendant to change solicitors with its attendant inconvenience. A more efficient mode would be to apply for interrogatories, discovery or any other interlocutory procedure to elicit information from the solicitors from M/s Shook Lin & Bok. (paras 14, 15, 20 & 23)

(3) A lawyer's invoice for fees and disbursements is not privileged from disclosure (*Ernest Cheong Yong Ying v. Kamariyah Hamdan & Ors)*; and bank statements are not covered by solicitor-client privilege as they do not constitute communications exchanged between the solicitor and his client for the purpose of seeking legal advice (*Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd & Ors (No 2)*). Taken at its highest, the plaintiff's application was premature. Similarly, for the defendant's assertion that it would be prejudiced if it could not utilise the services of M/s Shook Lin & Bok. If the evidence sought and elicited was not privileged or were exempted from privilege and hence admissible, a case for disqualification may be made out, and seeing that this action was scheduled for trial more than one year away in October 2025, the defendant bank would have sufficient time to appoint another set of solicitors, if necessary. (paras 26 & 27)

Case(s) referred to:

Celcom (Malaysia) Bhd & Anor v. Tan Sri Dato' Tajudin Ramli & Ors And Another Case [2020] 9 CLJ 390 HC ***(refd)***

Clements, Dunne & Bell Pty Ltd v. Commissioner of the Australian Federal Police [2001] 188 ALR 515 ***(refd)***

Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***

Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors [1988] CLJU 188; [1988] 1 LNS 188 HC ***(refd)***

Dato' Seri Dr Ling Liong Sik v. Krishna Kumar Sivasubramaniam [2002] 2 CLJ 642 HC ***(refd)***

Ernest Cheong Yong Ying v. Kamariyah Hamdan & Ors [2011] 10 CLJ 172 HC ***(refd)***

Lee Kam Sun v. Ho Sau Lin & Anor [1999] 4 CLJ 507 HC ***(refd)***

Lim Peng Khoon v. Tea Chun Hia & Ors (No. 2) [2022] CLJU 2543; [2022] 1 LNS 2543 HC ***(refd)***

Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors [2009] 4 CLJ 303 CA ***(dist)***

Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd & Ors (No 2) [2021] 7 CLJ 88 HC ***(refd)***

Perbadanan Pembangunan Pulau Pinang v. Tropiland Sdn Bhd [2010] 2 CLJ 1061 HC ***(refd)***

Projek Lintasan Kota Sdn Bhd v. Wisma Denmark Sdn Bhd & Anor [2012] 7 CLJ 651 HC ***(refd)***

Quah Poh Keat & Ors v. Ranjit Singh Taram Singh [2009] 4 CLJ 316 CA ***(refd)***

Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2016] 10 CLJ 164 CA ***(refd)***

Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal [2020] 4 CLJ 301 FC ***(refd)***

Wang Han Lin & Ors v. HSBC Bank Malaysia Bhd [2017] 10 CLJ 111 CA ***(refd)***

Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 SC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Evidence Act 1950, s. 126
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 28

For the plaintiff - Syed Muhd Isa Syed Muhamad; M/s KK Lim
For the defendant - Bryan Chen Liang Yi; M/s Shook Lin & Bok

Reported by S Barathi

JUDGMENT

Su Tiang Joo J:

Introduction

[1] On 4 July 2024, I had dismissed the plaintiff's application (encl. 84) to have the law firm of M/s Shook Lin & Bok removed and or disqualified and or restrained from acting for the defendant in this action with costs in the cause. Dissatisfied, the plaintiff has appealed and these are the grounds of judgment for the decision made.

Brief Background

[2] The defendant bank had commenced an action in the High Court at Johor Bahru Civil Suit No. JA-22NCvC-17-01/2016 ("fraud suit") through M/s Shook Lin & Bok, naming the plaintiff law firm ("plaintiff" or the "law firm") as the 13th defendant alongside 36 other defendants.

[3] In the fraud suit, the defendant bank alleged that the law firm, which prepared loan and security documents for credit facilities, was privy to a fraud perpetrated upon the bank whereby the securities charged to the bank were overvalued, causing the bank to suffer losses when it came time to enforce the charges made in its favour. Its losses were alleged to be RM56,544,000.

[4] The law firm applied to have itself struck out as party to the fraud suit. It failed at the High Court but succeeded at the Court of Appeal on 10 January 2022. It then commenced this action against the defendant bank on 26 January 2022, alleging that:

(i) the defendant bank should not have suspended the law firm from its panelship;

(ii) the defendant bank's personnel, employees, officers, agents and/or representatives had wrongfully disseminated information regarding the law firm's suspension of panelship to third parties including other financial institutions which affected its business and reputation;

(iii) following the filing of the fraud suit, the law firm suffered loss of business and consequently, on 28 May 2016, the law firm was dissolved with all its ten branches in among others, Kuala Lumpur, Selangor, Johor, Melaka, and Perak, shut down;

(iv) the fraud suit constitutes a tort of abuse of process filed in bad faith and for collateral purposes, seeking reliefs which the defendant bank had already obtained in its recovery action against the borrowers and enforcement of charge actions;

(v) it had at all material times discharged its obligations as the transactional solicitors for all the loans; and

(vi) it was forced to unnecessarily defend itself against the fraud suit for almost six years until it was finally struck out, causing it to incur unnecessary legal costs, its reputation tarnished and having to shut down.

[5] The law firm claimed for general damages, RM713,900 as legal costs incurred in respect of the fraud suit, further damages to be assessed, aggravated, exemplary and punitive damages, interest at 5% pa calculated daily on the sum awarded from 28 January 2016 till judgment pursuant to s. 11 of the Civil Law Act 1956 and at 5% pa on the judgment sum from the date of judgment till full settlement, costs and such further or other relief as this Honourable Court deems fit.

[6] The defendant bank filed a defence and counterclaim alleging, *inter alia*, that:

(i) it is entitled to do what it did;

(ii) the law firm had negligently advised the defendant bank to disburse the loan sums and had conspired with the rest of the defendants in the fraud suit to defraud it; and

(iii) it counterclaimed against the law firm for committing the tort of abuse of process against it in commencing committal proceedings against it.

[7] The defendant bank counterclaimed for RM15,000 incurred in defending the committal proceedings, general damages to be assessed, aggravated, exemplary and punitive damages, pre-judgment interest at 5% pa from 10 December 2020 until the date of judgment and post-judgment interest at 5 % pa from the date of judgment until the date of full settlement.

Court's Analysis And Findings

[8] From the narrative aforesaid, the action herein is predicated upon the fraud suit against the plaintiff, having been struck out by the Court of Appeal on 10 January 2022.

[9] During the course of hearing the application (encl. 84) on 29 May 2024, I was apprised by learned counsel for the plaintiff that the defendant bank had successfully applied for leave to appeal against the Court of Appeal decision of 10 January 2022, and that during the hearing of its substantive appeal on 21 May 2024, the Federal Court had allowed its appeal. The net result is that the law firm is reinstated as a party to the fraud suit. This would seemingly cut down the legs for this action to stand on. In the words of learned counsel for the defendant bank, it can no longer be said that the fraud suit by the defendant bank is an abuse of process, and I agree.

[10] However, I was further apprised that the law firm has filed two review applications flowing from the Federal Court's decision of 21 May 2024 allowing the substantive appeal. Thus, so as not to prejudice M/s Shook Lin & Bok's right of representation, I had deferred delivery of my decision on this application (encl. 84) until the outcome of the Federal Court proceedings.

[11] On the next date of 4 July 2024, I was apprised by learned counsel for both parties that they are ready to receive my decision. Thus, both are of the view that the decision for this application will not have any impact on this action or the Federal Court proceedings.

[12] Therefore, as it stands, the suit herein premised upon the fraud suit having been struck out as against the plaintiff, the main plank for the plaintiff's suit grounded on tort of abuse of process has been swept away and carrying away with it, this application.

[13] Over and on top of the aforesaid reason, there is another reason why I had dismissed the application. The reason is that of legal professional privilege housed in s. 126 of the Evidence Act 1950, which provides as follows:

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure:
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> (a) any such communication made in furtherance of any illegal purpose;
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> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
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> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

A Explanation - The obligation stated in this section continues after the employment has ceased.

ILLUSTRATIONS

(a) A, a client, says to B, an advocate: "I have committed forgery and I wish you to defend me."

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As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.

(b) A, a client, says to B, an advocate: "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

C This communication being made in furtherance of a criminal purpose is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an advocate, to defend him. In the course of the proceedings B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at

D the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

E **[14]** The plaintiff had also grounded its application on the premise that M/s Shook Lin & Bok and its counsel, Tan Gian Chung, would be material witnesses in this action. In its list of 29 witnesses (encl. 87), the plaintiff listed the following persons associated with M/s Shook Lin & Bok whom it will be producing by way of subpoenas as its witnesses:

F (i) Yoong Sin Ming (former partner of Shook Lin & Bok);

(ii) Lau Kee Sern (former partner of Shook Lin & Bok);

(iii) Chan Kok Keong (partner of Shook Lin & Bok);

(iv) Heng Chia Leng (former advocate and solicitor of Shook Lin & Bok); and

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(v) Tan Gian Chung (partner of Shook Lin & Bok);

[15] Reliance was placed by the plaintiff on rr. 3 and 28 of the Legal Profession (Practice and Etiquette) Rules 1978, which provides that an

H advocate and solicitor is not to appear in any case in which he would be embarrassed or has reason to believe he will be a witness in respect of a material and disputed question of fact and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interest. The law is

I trite that justice should not only be done but should be seen to be done in the administration of justice. Put another way, a strict test ought to be observed in ensuring that not only is there no actual conflict but there is no

appearance of conflict on the part of those involved in the administration of justice, including the counsel representing the parties to the action. See *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345; [1993] 3 MLJ 679; *Quah Poh Keat & Ors v. Ranjit Singh Taram Singh* [2009] 4 CLJ 316; [2009] 4 MLJ 293; *Lee Kam Sun v. Ho Sau Lin & Anor* [1999] 4 CLJ 507; [1999] 4 MLJ 509; *Perbadanan Pembangunan Pulau Pinang v. Tropiland Sdn Bhd* [2010] 2 CLJ 1061; and *Lim Peng Khoon v. Tea Chun Hia & Ors (No 2)* [2022] CLJU 2543; [2022] 1 LNS 2543.

[16] On the advocate and solicitor being embarrassed, in my considered view, reliance by the plaintiff on the authority of *Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors* [2009] 4 CLJ 303; [2009] 4 MLJ 671, and related authorities for the principle of being barred from acting whilst in possession of confidential information from a previous client is misconceived because M/s Shook Lin & Bok is not acting against its client, the defendant bank.

[17] The defendant bank asserts in its affidavit in opposition (encl. 112 paras. 11.4 and 11.6) that whatever information that M/s Shook Lin & Bok and its lawyers, including Tan Gian Chung, may have acquired, is protected by professional legal privilege, see s. 126 of the Evidence Act 1950 (*supra*). Further, once privileged is always privileged, see *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14; *Wang Han Lin & Ors v. HSBC Bank Malaysia Bhd* [2017] 10 CLJ 111; and *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1988] CLJU 188; [1988] 1 LNS 188.

[18] The reply by the plaintiff is that M/s Shook Lin & Bok and Tan Gian Chung ought to possess confidential information specifically from documents provided and relied upon in the fraud suit. This is probably the case, but the professional legal privilege bar which the plaintiff has not replied to in its submissions, is seemingly, at this point in time, too high a hurdle for it to cross to support its oblique assertion that these advocates and solicitors have facilitated the suppression of facts or have deliberately presented a legal position that does not fully disclose the law. Support was sought from the speech of Nallini Pathmanathan FCJ in the Federal Court case of *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal* [2020] 4 CLJ 301; [2020] 3 MLJ 545 at paras. 54 to 56, where Her Ladyship said:

> Duty of advocates and solicitors to the court
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> [54] These submissions by the contractor serve as an appropriate occasion for this court to reiterate the oft-ignored principle that advocates and solicitors are officers of the court. Their overriding duty is to the court, not their clients. As such they are under a duty to provide honest and complete submissions. Integrity is of the utmost importance in advocacy, whether oral or written.

A *[55] It follows sine qua non that suppression, or deliberately presenting a legal position that does not fully disclose the facts or the law, is a grave dereliction of the responsibilities of an advocate and solicitor. They are duty bound not to suppress facts or law which are either against their client's case, or does not support it, because of their overriding duty to the court, and ultimately the administration of justice as a whole.*

B [56] On this issue Raja Azlan Shah Ag LP (as His Royal Highness then was) approved of the following passage in *Jaginder Singh & Ors v. The Attorney-General* [1983] 1 MLJ 71 at p 72; [1983] CLJ (Rep) 176 at p. 178:

> *... The court can dispense justice only if counsel will not mislead, otherwise justice will suffer from the infirmity of the court itself being devoid of justice. People seldom pause to ask sometimes what safety the ordinary individual has in the hands of the lawyers if the court itself, in which he seeks redress, is no longer safe to be in the same hands.*

C (See also the cases cited at paras 8-9 of Lord Clarke of Stone-cum-Ebony's speech to the Malaysian judiciary on 14 September 2011 entitled Ethics and Civil Procedure (accessed at http:/www.kehakiman.gov.my/sites/default/filesETHICS%20for%20Malaysian%20Judges %200%202011_. Pdf on 30 September 2019), the English cases of *Saif AH And Another v. Sydney Mitchell & Co (a firm) and other appellants* [1980] AC 198 and *Arthur JS Hall & Co (a firm) v. Simons Barratt v. Woolf Seddon (a firm) Harris v. Scholfield Roberts & Hill (a firm)* [2002] 1 AC 615 at pp. 686 and 692 (particularly the judgments of Lord Hoffman and Lord Hope in the latter case) as well as the Australian case of *Giannarelli And Others v. Wraith And others* [1988] 81 ALR 417 at p 421).

(emphasis added)

[19] I say, seemingly, because there are exceptions to s. 126 of the Evidence Act 1950 (*supra*), which would displace the professional privilege, two of which are provisos housed in s. 126 itself, that of:

(a) communication made in furtherance of any illegal purpose, and

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

[20] As at this point in time, the plaintiff has not identified the materials and, if necessary, for the court itself to peruse the materials to ascertain whether any of the evidence sought to be admitted is in fact and in law privileged, or comes within the exceptions to the professional legal privilege bar before determining that it is indeed so privileged.

[21] On what has to be done to deal with a claim of professional legal privilege, I find the speech of North J in *Clements, Dunne & Bell Pty Ltd v. Commissioner Of The Australian Federal Police* [2001] 188 ALR 515, to be helpful. His Lordship, speaking for the Federal Court of Australia Victoria District Registry, said:

The degree of proof required

[45] The major cases which have examined the degree of proof necessary to establish that a communication is not privileged have concerned instances where allegations of fraud or impropriety were made in pleadings or in criminal charges. In such circumstances, the question arose whether the pleading or the charge was alone adequate to establish the existence of wrongdoing such that the court would hold the communication not to be privileged. Whilst the circumstances of the present case are far removed from cases in which the allegation of fraud was barely substantiated, the cases have described the principles applicable to establishing the necessary level of impropriety.

[46] In *Bullivant*, an examination was laid against executors claiming particular duties and alleging that the testator had executed certain voluntary conveyances with intent to evade payment of those duties. The Supreme Court of Victoria ordered the examination on commission of a solicitor in England. In the course of the examination, the witness was asked to produce a diary kept by the solicitors for the testator containing instructions given by the testator in relation to the voluntary conveyances.

[47] The House of Lords upheld the claim for privilege. The Earl of Halsbury LC said, at 201:

> *If you are to say, '1 will not say what these communications are because until you have actually proved me guilty of a crime they may be privileged as confidential,' the result would be that they could never be produced at all, because until the whole thing is over you cannot have the proof of guilt On the other hand, if it is sufficient for the party demanding the production to say, as a mere surmise or conjecture, that the thing which he is so endeavouring to inquire into may have been illegal or not, the privilege in all cases disappears at once. The line which the Courts have hitherto taken, and I hope will preserve, is this – that in order to displace the prima facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not*.

[48] Then, in a passage which has particular relevance to the analysis of the facts of this case, His Lordship said, at 201-202:

> Now, my Lords, when I look at all that is to be found here, I find no such definite charge at all. If, for the purpose of evading the payment of duty to which the man was liable, he entered into some secret and covinous arrangement whereby, although he should still retain the property during his lifetime, nevertheless colourable deeds should be executed which would shew that the property was not liable to duty, that would undoubtedly be a fraud, and I should think there would be no doubt that a person who was engaged in such a transaction could be compelled either to produce the correspondence or to state the conversation shewing how the alleged fraud was intended to be carried out. But there is no such allegation – there is nothing here which any Court can regard as an allegation of fact sufficient to displace the privilege. If the fact

A were merely that the person did execute voluntary deeds the effect whereof was that the tax never fell upon the property at all, I do not know that there is any offence in that either in Victoria or in this country.

[49] And, at 203, he said:

B *[T]he judge would have to satisfy himself whether there was really established to his satisfaction a charge of fraud or something that would displace the privilege – I do not say prove it – but it would be a reasonable and proper thing under the circumstances to establish the proposition that the issue to be tried was whether there was really a fraud or not, and that this was a piece of evidence relevant to establish the fraud.*

C [55] *Bullivant* and *O'Rourke* have been the foundations for the learning on this question in Australia. The most usual starting point is the judgment of Gibbs CJ in Kearney where, at 516, he said:

The privilege is of course not displaced by making a mere charge of crime D *or fraud or, as in the present case, a charge that powers have been exercised for an ulterior purpose.*

This was made clear in *Bullivant v. Attorney-General (Viet)* [[1901] AC at p. 201, p. 203, p. 205] and in *O'Rourke v. Darbishire* ([1920] AC 581 at p. 604, pp. 613-614, pp. 622-623, pp. 632-633). As Viscount Finlay said in the latter case, 'there must be something to give colour to the charge'. His E Lordship continued:

The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact ... The court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the F *purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications.*

(emphasis added)

[22] Closer to home, His Lordship Wong Kian Kheong J (now JCA) in G *Celcom (Malaysia) Bhd & Anor v. Tan Sri Dato' Tajudin Ramli & Ors And Another Case* [2020] 9 CLJ 390; [2020] 11 MLJ 44 provides the following useful guidelines in dealing with a challenge to a claim of professional privilege:

[24] I have decided in *Toralf Mueller v. ALCIM Holdings Sdn Bhd* [2015] H MLJU 779 at para [75(i)], as follows:

[75] ...

(i) the court has a discretion to hold a 'trial within a trial' (*voir dire*) to ascertain the admissibility of a piece of evidence which is alleged to be legally privileged ... In this case, I had exercised my I discretion not to hold a 'trial within a trial' as the admissibility of evidence whereby legal privilege had been claimed by the Petitioner, could be easily decided based on the evidence adduced in this case and the parties' submission.

[29] ...

(i) *before the court's decision (TWT)* is made, the court has a discretion to peruse the legally privileged communications to ascertain whether provisos (a) and/or (b) applies. Needless to say, the party who applies for the admissibility of legally privileged communications (Z), is not entitled to peruse such evidence before the court makes a decision to admit or not such evidence at the conclusion of a TWT**. This is to ensure that the privilege is not lost in the event the court holds that the legally privileged communications is not admissible after a TWT* has been held; and

(j) if the court admits the legally privileged communications, the court has a discretion to redact the document containing the legally privileged communications (unredacted document) so as to exclude contents of the unredacted document which are not relevant to the case at hand (redaction). The court has a discretion to allow or disallow Z to inspect the unredacted document before the redaction is carried out.

[30] The above procedure for TWT* is based on TWT's conducted in criminal cases. I see no reason why the procedure for TWT* in criminal cases should not apply in civil cases. Furthermore, I am of the view that neither principle nor policy consideration bars the court from exercising its discretion under O 33 r 3(1) and/or (2) of the RC to conduct a TWT* to determine the admissibility of the following evidence (other than legally privileged communications):

(a) marital privilege (s. 122 of the EA);

(b) 'affairs of State' privilege (s. 123 of the EA);

(c) 'official communications' privilege (s. 124 of the EA); and

(d) privileged information concerning commission of offences

(s. 125 of the EA).

* Trial within a trial (emphasis added)

[23] In my considered view, to wait until the trial to commence and then to carry out a trial within a trial ("TWT") to determine whether the asserted legally privileged information is admissible would disrupt the smooth flow of trial. If the TWT favours the plaintiff, there may then be a need for the defendant to change solicitors with its attendant inconvenience. A more efficient mode would be to apply for interrogatories, discovery or any other interlocutory procedure to elicit information from the solicitors from Shook Lin & Bok as was done in the case of *Dato' Seri Dr Ling Liong Sik v. Krishna Kumar Sivasubramaniam* [2002] 2 CLJ 642; [2002] 2 MLJ 278 at pp. 288 and 289. In this case, in the course of allowing discovery for certain information, His Lordship Arifin Zakaria J (later CJ) said:

The particulars sought under paras. 6(a) and (b) of the re amended defence relate to:

A (i) the date and mode of the instructions; and

(ii) the location of the client at the time of the alleged conversation/ instructions.

The defendant submits the words 'any communication' in s. 126(1) of the Act includes time, date, mode, manner, *etc*, of such communication. B No authority was submitted by the defendant to support this contention. Having considered this issue, I agree with the submission of counsel for the plaintiff that particulars sought in para. 6(a), and (b) do not come within the ambit of legal and professional privilege as provided in s. 126 of the Act. As stated by Suzanne B McNicol in the *book Law of Privilege* (1992 Ed) at p. 97: C

> *Legal professional privilege only applies to communications. It will not, therefore, prevent the disclosure of facts observed or discovered by either party in the course of their relationship as client and legal adviser. As Parke B stated in Dwyer v. Collins, 'the privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them'. The 'observed facts' exception highlights the limits of the doctrine of legal professional privilege, for, as Heerey J stated in National Crime Authority v. S, legal professional privilege 'does not depend on some notion that the lawyer's knowledge becomes the property of his client'. This means that any facts which a legal adviser would have ascertained in any event, irrespective of professional skill and irrespective of a confidential communication with the client, will not be privileged*. For example, the client's name and address are facts which are often not communicated confidentially to the legal adviser. Similarly, facts such as the client's handwriting, the client's mental capacity, the existence of a retainer between the legal adviser and client and the fact that the client put in pleadings and swore an affidavit have all been held within the exception to legal professional privilege. Furthermore, it appears that any information which is communicated other than by oral or written means is not protected by the privilege. As Martin B said in *Brown v. Foster*, privilege does not attach to 'matters which the counsel sees within his eyes'. D E F

> > This necessarily entails that personalty, chattels or any other type of physical object, other than documents, cannot be protected by the privilege. G

> *Further, I find the particulars sought for under these two paragraphs are relevant to the issue of verification of the truth of the letter of demand with the client. I therefore ordered that the defendant do furnish to the plaintiff the particulars sought for under paras 6(a) and (b) of the re-amended defence as prayed for by the plaintiff.* H

(emphasis added)

[24] To echo the words of His Lordship, Vazeer Alam Mydin Meera JC (now FCJ) in *Projek Lintasan Kota Sdn Bhd v. Wisma Denmark Sdn Bhd & Anor* [2012] 7 CLJ 651 at para. [52], "It would do well for counsel to think through and be certain that a person is required as a witness before requesting for issuance of subpoena by the court to compel the presence of that person. The issuance of a subpoena wily-nily would attract dire consequences." I

[25] On what does not amount to professional privileged communications, see *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2016] 10 CLJ 164; [2016] 5 MLJ 127 at p. 173 (CLJ); p. 137 (MLJ), which held that:

> [32] Even if it is assumed that common law privilege is applicable in this case, we take the view that there can be no privilege over material facts. We agree with learned counsel for the respondent that the detailed survey plan contains facts relating to the appellant's infrastructure on and over the respondent's lands. These facts go to the core of the issue of trespass. *Facts which are conveyed in communications subject to litigation privilege are not privileged. It is significant that there is no assertion that the detailed survey plan was commissioned or obtained by the appellant's solicitors. Neither was it procured by the appellant for the purposes of obtaining legal advice. The detailed survey plan came into existence as a result of the appellant's own fact finding exercise. A witness can be compelled to give evidence both of the facts he had observed and of his opinion of those facts. If the witness cannot be compelled to give evidence, the material facts could effectively be concealed.*
>
> (emphasis added)

[26] See also *Ernest Cheong Yong Ying v. Kamariyah Hamdan & Ors* [2011] 10 CLJ 172 at para. 19, where it was held that a lawyer's invoice for fees and disbursements is not privileged from disclosure; and *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd & Ors (No 2)* [2021] 7 CLJ 88 at paras. 32 to 41, where it was held that bank statements are not covered by solicitor client privilege as they do not constitute communications exchanged between the solicitor and his client for the purpose of seeking legal advice.

[27] Taken at its highest, the plaintiff's application is premature. Similarly, for the defendant's assertion that it will be prejudiced if it cannot utilise the services of M/s Shook Lin & Bok with reliance placed on *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345, where a subpoena issued was set aside, *inter alia*, on the ground, that it is oppressive when it was issued and served in the middle of the trial. This is because, if the evidence sought and elicited is not privileged or are exempted from privilege and hence admissible, a case for disqualification may be made out, and seeing that this action is scheduled for trial more than one year away in October 2025, the defendant bank would have sufficient time to appoint another set of solicitors, if necessary.

Conclusion

[28] Wherefore, the plaintiff's application is dismissed with no order as to costs.